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ABSTRACT

Rhetorical critics generally base their comments on the assumption that a communicator has all the reasons, persuasive devices, and approaches available in the rhetorical situation, and that he can make choices of what should be utilized. The lawyer-persuader, however, does not have unlimited choice since he is bound by legal rules and constraints. Therefore, the rhetorical critic must at least be aware of the legal constraints before he can criticize lawyers' choices and persuasive methods. Courtroom atmospheres, settings, and traditions, as well as laws and set procedures, impose rhetorical restrictions. Some recently published articles on the communication process and on forensics indicated an awareness among scholars of the possibilities that unique courtroom situations offer for further communication research. (RN)

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A CRITICAL EVALUATION OF LEGALLY ORIENTED COMMUNICATION RESEARCH

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To begin, I shall examine what might be called a model or paradigm of the legal arena most often studied by the communication researcher, the trial. While lawyers do many other things besides conducting trials and even though most legal controversies do not culminate in trials, communication researchers have almost always concentrated on the trial. This is what we might in fact expect. Judge Jerome Frank, who was a one-time Yale Law School professor and a leader in the legal realist movement, in his 1949 volume Courts on Trial, entitled Chapter 13 "A Trial as a Communicative Process" and we might note that he may have been using the term communicative process before we began to use it. The trial has been the focus of much of our communication and law research because it does involve the elements and the processes which we study.

A trial involves not only communication, but also evidence, testimony, arguments, credibility, an adversarial relationship between the parties, decision making, and if there is a jury, all the elements of small group communication come into play. Hence it is not surprising that Speech Communication scholars have begun to study the trial and other points of contact with the law. The only surprise may be that we did not begin sooner and do more communication and law research. There is one basic problem which I suspect much of the research in our discipline has not taken into account, and it is my thesis that this one problem accounts for much of the shortcomings in the research which I will

examine in this paper.

To understand this problem, we must consider what in fact the Speech Communication researcher does. The rhetorical researcher may use one or several of the approaches available to him, but basic to his work is the examination of the reasons or arguments employed by the communicator. Or, as Karl Wallace put it, rhetoric is the finding of good reasons. The rhetorical critic examines these reasons and the context in which they are offered and comments on the total process he observes. Although it is almost never stated in so many words, the rhetorical critic operates from the assumption that the communicator or lawyer in this situation had available to him all of the conceivable reasons, devices, and strategems, and that the lawyer-persuader then made a choice from all of the approaches available. The critic then proceeds to discuss not only what was done but what might have been done. Other factors come into play in the various schools of criticism, but in essence I think we have fairly described what the rhetorical researcher does. The problem is that the lawyer-persuader does not have an unlimited choice of the available reasons. The lawyer operates within a system of constraints or rules which limit his choices. There are rules of procedure, there are rules of evidence, in fact, the study of law as an academic discipline is primarily a study of the rules under which the lawyer operates.

This means that the rhetorical critic must be at least aware of the constraints or rules which limit the choices of the lawyer before he can begin to do research and criticize the work of the lawyer. This is a less pervasive problem for the empirical researcher, but it is still a problem, as Kalven and Zeisel pointed out in The American Jury (1968), which is still the definitive work in empirical legal research.

> The trial of an issue or act is not simply a scientific exercise but a practical affair conducted with stringent deadlines and without the scientist's perogative of suspending judgment until further evidence is in. A trial is an exercise in the management of doubt, for which the law has rules about burden of proof that science does not need.

So once again we see the need for the communication scholar to understand and consider the rules or constraints under which the lawyer and the courts operate. Having established this theoretical base, I should now like to turn to a critical examination of some of the recent research. In examining the national and regional journals in Speech Communication for the last decade I have come up with two major rhetorical studies of trial situations and I will discuss both. In March, 1971, Speech Monographs included "Darrow and Rorke's Use of Burkean Identification Strategies in New York vs. Gitlow (1920)," by Akira Sanbonmatsu. Early in the article we are told:

> This study demonstrates the competent usage of substantive and dramatistic identification strategies by Darrow and Rorke in New York vs. Gitlow. In addition, it compares the selection, adaptation, and probable effectiveness of their identification strategies in the rhetorical stiuation.

Sanbonmatsu presents the context and background of the trial but his sources are all either historians or journalists. No legal sources are cited and the case is not put into any legal context. Darrow's legal strategy which is credited to historian Max Eastman is "to get Gitlow off by hushing the implications of the subversive things he (Gitlow) said." Sanbonmatsu says Darrow attempted to do this by arguing that the Left Wing Manifesto was prophecy and history, not advocacy. The Left Wing Manifesto was a pamphlet that Gitlow had distributed which it was charged was in violation of the New York anti-criminal syndicalism law. Sanbonmatsu goes on to elucidate the various identification strategies used by

Darrow and Rorke. He discusses the use of witnesses by Rorke to establish Gitlow's publication of the documents and his responsibility for them. We are not told that lawyers must use witnesses or exhibits to introduce any information into a trial and that Gitlow had indeed readily admitted his responsibility for the document and was asserting a legal right under the First Amendment to publish his manifesto. The critic devotes most of his effort to developing the identification strategies used by the attorneys and sums up by saying, "Darrow's legal case appeared to have very little supportive data, whereas Rorke's was well supported by law and proof. Above all, this trial is a model of identification strategy."

Finally, Sanbonmatsu suggests that Darrow put Gitlow on the witness stand because he (Gitlow) insisted that he have an opportunity to address the jury and the implication is that Gitlow severely damaged his own case. Now let us look at the legal constraints and aspects of the case.

Gitlow was indicted for violation of Sections 160 and 161 of the New York Penal Code which authorizes the arrest and conviction of any person teaching the doctrine that organized government should be overthrown by force. Darrow argued that Gitlow was not teaching overthrow, but only speculating in a theoretical manner, and that such speculation was legal under the freedom of speech and press guaranteed to Gitlow in the First Amendment of the Constitution. According to Joan Gitlow, the daughter of the defendant, Darrow put her father on the witness stand to demonstrate that he was totally incapable of leading a revolution and that his manifesto was nothing more than history and prophecy. Darrow's choices were severely limited. Since Gitlow had signed and readily admitted responsibility for the Left Wing Manifesto, Darrow could not argue lack of involvement by his client. He could only, and did, defend Gitlow's right

to freedom of press and speech and he did so by trying to show that Gitlow was simply not capable of being a revolutionary leader, and that he had neither the intention nor the possibility of overthrowing the government.

While it is true that Darrow lost the case before the jury and on appeal before the Supreme Court, it is important to observe that two rather reputable critics and Justices, Oliver Wendel Holmes and Louis Brandeis dissented from the majority decision writing:

> If the publication of this document had been laid as an attempt to induce an uprising against the government at once and not at some indefinite time in the future, it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences.

Gilmor and Barron in Mass Communication Law (1969) observe that "It is Brandeis' formulation of the clear and present danger doctrine rather than Sanford's majority opinion which has prevailed."

It would appear the Holmes and Brandeis and subsequent judges and legal scholars came to a different judgment of Darrow's "selection, adaptation, and probably effectiveness" than Professor Sanbo matsu. We can, of course, observe that Brandeis and Holmes and Gilmor and Barron were viewing the case from a legal perspective rather than from a Burkean one.

A second major effort at rhetorical criticism of a trial appeared in the Quarterly Journal of Speech in February 1971; it is "Oral Argument Before the Supreme Court: Marshall v. Davis in the School Segregation Cases," by Milton Dickens and Ruth E. Schwartz. It is only a small point but this time we have versus abbreviated as v. which is the usual legal ractice, rather than vs. as in the previously discussed paper. Dickens and Schwartz begin by stating that they will not only compare and evaluate the oral arguments of the opposing lawyors, but will also describe the

distinctive characteristics of oral argument before the Supreme Court. This decision may have contributed significantly to the higher quality of this piece of research.

Schwartz and Dickens derived their critical criteria by analyzing the transcripts of the case and by studying the statements of the judges and lawyers involved in the case. They describe their procedure by saying that it may be figuratively compared with the quantitative technique of factor analysis.

> This procedure of deriving criteria from the data may be contrasted with the more common practice of adopting the criteria of previous rhetoricians, e.g. Aristotle's triad or Kenneth Burke's pertad . . . The three factors evolved were clarity, adaptability, and strategy."

They go on to discuss these factors quite effectively, offering specific examples to back up their general concepts, and they relate their criticism to the contest of the Supreme Court.

In the discussion of strategy, we find some incisive observations:

> Successful rhetorical strategy before the Supreme Court differs from most other persuasive speaking situations. Successful strategy in political campaigning may resemble commercial advertising. Strategies in legislative debates and jury trials may be loosely constructed, partly irrelevant, even contradictory . . . Not so, in the Supreme Court . . . The conversation is face-to-face and intimate, yet constrained by a formal set of rules and a formidable tradition.

This is a good start and as might be expected Dickens and Schwartz do succeed in shedding some light on the operations they analyze. They correctly identify the issues; Davis' case is shown to be based on the then legal status quo of separate but equal school facilities, while Marshall is shown to be arguing that segregation is inherently a denial of equality. The authors also correctly point out that Davis' case was

handicapped by the failure of his side to call social scientists as witnesses to refute Marshall's expert witnesses who had testified on the destructive effects on the personality of the black child which resulted from segregation. They do come to grips with the problem of constraints by stating that witnesses may be called only during the original trial and not during any of the subsequent appellate hearings.

Unfortunately, they do miss one point, albeit a subtle point of constraint, but one which does play a major role in our understanding of the case. Davis and his colleagues who were arguing the case for the defense, the Topeka School Board, were legal traditionalists; they saw only the traditional legal arguments of precedent, statute, etc. as the basis of a case before the courts. This then was perhaps a self-imposed constraint which grew out of their training, experience, and view of the legal process. Marshall, on the other hand, was a legal realist; the simplest definition of a legal realist is one who would consider any and all sources as grist for the legal mill. Operating from this position, Marshall and his associates brought in numerous social scientists to testify as to the negative psychological and sociological effects of segregation. We might also consider that since the precedent was not on their side they had to find some way to minimize it. While the use of social science is new, the tactic itself comes from Aristotle (1. 15. Page 80, Cooper Translation):

> It is clear that if the law is adverse to our case, he must appeal to the universal law, and to the principles of equity as representing a higher order of justice.

Dickens and Schwartz go on to conclude that "Marshall's strategical choices coincided much more closely with the Court's verdict than did Davis' choices . . . This parallelism may be coincidental or it may indicate that the oral argument strongly influenced the thinking of the Court."

This is a properly cautious attitude for researchers, but it misses one significant hypothesis. Was it possible that Marshall realizing that the court had, by 1956, come to be dominated by legal realists and also realizing that the precedents or common law were against him, undertook to build his case with the unorthodox tactic of social science testimony foreseeing that Davis would not take it seriously until it was too late, while the court would indeed be receptive to such arguments? We need not answer the question, but we can see why Dickens and Schwartz should have raised the question and also explored the constraints resulting from Davis' lifelong adherence to legal traditionalism.

Dickens and Schwartz reach eight conclusions, all of which are cogent, but I will quote just two of them.

> He (the lawyer) must speak within the confines of a formal set of rules, some requiring technical (legal) training, knowledge, and experience. The traditions, atmosphere, and physical settings impose additional constraints, rendering inappropriate or ineffectual many rhetorical techniques commonly used in other types of persuasive speaking; the elements of a public spectacle are conspicuously absent.

In spite of the previously stated limitation, this is clearly a useful and cogent piece of research.

Turning from the rhetorical criticism-type study, I should next like to examine the communication process study and again I have selected two of these as reasonably typical. The first is by Stanley Jones in the Journal of Communication (March 1969), "Directivity vs. Nondirectivity: Implications of the Examination of Witnesses in Law for the Fact-Finding Interview." Essentially, this article is an attempt at a synthesis of concepts of interviewing and especially a comparison of the interviewing techniques of the lawyer with those of the psychologist. Jones does deal with the problem of court room constraints pointing out how the legal

rules of evidence restrict lawyers in the asking of questions of witnesses. He suggests that because of these constraints the lawyers examination of the witness exemplifies the direct approach to interviewing.

He goes on to find certain positive values in the direct approach to interviewing and concludes that the direct and nondirect methods should both be utilized. Jones' other conclusions relate to the development of interviewing theory and do not really concern us at this time. Jones' method is interesting and suggestive and might be useful in theory building in forensics and other areas of Speech Communication. Jones shows good basic understanding of the legal constraints of the attorney's interviewing of the witness, but he does not come to grips with the fact that most friendly witnesses are called by the attorney interviewing them. This means that the attorney will rehearse the examination of the witness; if he is ethical, the attorney will not tell the witness what to say, but he will probably be guided in his final choice of questions by his prior knowledge of what the witness will say. He may even ethically make suggestions intended to improve the clarity of the testimony. This relationship which is not alluded to in the research will have considerable impact on the testimony and differs considerably from the psychologist's interviewing techniques.

Jones never clearly delineates the difference between the lawyer's interview and that of the psychologist. The lawyer is trying to build his case or in cross-examination to tear down the case of the other side, his interviewing is subjective, not objective. The psychologist is presumably seeking only to understand the client. Perhaps Jones should have dealt with the legal equivalent of the psychologist's interview, the lawyer's interview of the client where he seeks only to understand the case before him. Perhaps one can also compare the lawyer's pre-trial discovery

proceedings to the psychologist's interview but here again the legal constraints intrude. For example, the lawyer may not ask a question which can be considered a fishing expedition, but must confine himself to specific questions about the case of the opposition.

The second communication study I want to consider is by Robert Forston in Today's Speech (Fall 1970) which was a special issue of that journal devoted to studies in communication and law and perhaps it says something about the value of specialization. The article is entitled "Judges' Instructions: A Quantitative Analysis of Jurors' Listening Comprehension." As the title suggests, the purpose of the study was to determine how much of the judges' instructions individual jurors and juries comprehend. The study has ecological validity in that it involved actual judges' instructions and six-man juries in addition to individual juror responses. Forston's results indicate that juries comprehend more collectively than individually and that the level of comprehension is higher than listening theorists would predict ranging up to 93.3% for some civil juries. This study is rather well done precisely because the research is fully aware of the constraints of the legal situation. There is perhaps one weakness; many of the subjects employed are college student volunteers. College students are seldom found on real juries and are probably better educated than the typical juror. However, I suspect that the problem is one of finances rather than one of design. On the plus side, my own jury research indicates that college students make good jurors and that they do not differ greatly from the usual real world juror in their deliberations. Because Forston has an insightful understanding of both communication research and of law, his study comes closest to meeting the criteria for an effective blending of both worlds. Forston examines the problem of

juror comprehension from three angles; first that of the single individual working in isolation which is typical of much of the empirical research in Communication and gets the lowest level of comprehension from this approach; second he puts groups of six responses together at random to get something he calls a synthetic six-man jury and comprehension goes up; third he sets up face-to-face deliberating juries and gets the highest level of comprehension. Note that only the third situation is found in the actual judicial process.

As I stated previously, Forston's article is part of a special issue on the area by Today's Speech, while the quality does vary from article to article, overall it is much superior to the articles in this area found in such so-called "prestige" journals in our discipline as peech Monographs and the Quarterly Journal of Speech. I would hypothesize that the reason for this surprising situation is that Michael Prosser as editor of TS attempted to use knowledgable people both from our discipline and from law schools as consulting editors.

Finally, I should like to examine briefly legally oriented research in the Journal of the American Forensic Association. While it may surprise some, I would conclude that in general the studies found in J.A.F.A. are of much better than average quality and that they uniformly exhibit an understanding of the constraints of the legal situation as well as an appreciation for the relationships of forensics and the law.

As examples, I would refer you to two articles by Raymond Beard, "A Comparison of Classical Dialectic, Legal Cross-Examination, and Cross-Question Debate," (May 1966) and "Legal Cross-Examination and Academic Debate" (Spring 1969). Basically both of these studies are attempts to trace relationships between legal argument and forensics and to find

principles of legal cross-examination and argument which might be useful to those interested in debate. Both articles are successful at least in part because the researcher shows a clear grasp of the constraints under which the lawyer operates. As a result the article is both meaningful to the reader concerned with theoretical relationships and a source of useful guidance to the debater or debate coach.

Another example of first-rate scholarship in J. A. F. A. is Charles O. Tucker's "Forensics and Behavioral Science Research in the Law" (May 1965). This article summarizes the development of behavioral science research in law in such areas as the jury, the actions of courts, and the trial process. Not only does Tucker provide a clear and thorough and aware synthesis of the past points of contact between communication and law, but he also makes some cogent observations regarding potential research in the area. Since his study was published in 1965, and thus predates all of the research discussed in this paper, it seems only reasonable to suggest that most of the studies reviewed would have been better done had the writers read and pondered Tucker's essay. A conflict of interest forces me to mention only briefly an article which I co-authored in J.A.F.A. (Fall 1970) with Ralph Towne, "The Use of the Demurrer in Debating." Needless to say, we tried to write with an eye on the legal constraints while suggesting that one of those procedural constraints, the demurrer, might be useful in intercollegiate debating. In view of easily observed connection between law and forensics, we should not be surprised that a reasonable quantity of competent research in the communication and law area has appeared in J. A. F. A. Perhaps I can set this relationship in perspective by an excerpt from Raymond M. Alden's "The Art of Debate" published in 1900 and apparently the second debate text published in the

United States, after Baker's pioneering text.

> The aim of the present writer has been, while placing stress on systematic presentation, to look at the whole subject less from the standpoint of the theorist than from that of the practical debater.
>
> It is for just this reason that legal argument has been largely taken as the basis for the general subject of debate. It is in the profession of the law that the art of debate has for a long time achieved a highly practical development, and in that profession only. Philosophers have seldom been successful debaters, just as rhetoricians are seldom distinguished writers, and professional elocutionists seldom orators. But in the law public debate has been forced to cut a straight path toward success, and we may look to it for guidance--while not necessarily trying to master its artificial system--whenever our object is to convince and persuade practical men. On the other hand, the law has much to learn from logic and rhetoric. Many who are proficient in its subject-matter are quite unfamiliar with the art of using their knowledge effectively. "The time will soon come," said a distinguished lawyer recently, "when our law schools will have to teach their students not only the law, but also the art of selecting and arranging their arguments, and of presenting them with convincing effect."

I have attempted in this paper to selectively review and evaluate legally oriented communication research. In doing so, I have advanced the thesis that useful legal communication research requires a knowledge on the part of the researcher of the constraints within which legal communication takes place. While I have discussed some of these constraints in a specific fashion and others in a general way, I have refrained from any attempt to list them in a systematic fashion. The omission of such a list is not an oversight. I regret to say that I doubt that in the time at my disposal I could develop such a list. I suspect such an undertaking would become a life's work for even the most industrious scholar among us. How then can the problem of dealing with these constraints be solved? I suggest that we consider the solution employed by sociologists and anthropologists and other social scientists who wish to work in cross disciplinary studies involving law. Their procedure has been to develop doctoral and post-doctoral programs involving one or two semesters of study in a law

school of the basic areas of law. This may seem like an arduous and time consuming solution to the problem I have posed, but I am unable to offer a better one.